IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-618

CLEM MARTIN, *et al.*, *Petitioners,*

vs.

CONTINENTAL GRAIN COMPANY, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The August 4, 1976, opinion of the court of appeals is reported at 536 F.2d 592 and appears in Appendix A to the petition for a writ of certiorari. The January 16, 1975, opinion of the district court, which is unreported, is reprinted in the appendix to this brief.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1976. Petitioner's motion for rehearing was

denied on September 15, 1976. The petition for a writ of certorari was filed on November 1, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Did the court of appeals err in determining that the evidence was sufficient to support the district court's finding that petitioners were "merchants" within the meaning of §§2.104 and 2.201, Vernon's Texas Codes Annotated, Business and Commerce?

STATEMENT OF THE CASE

This diversity action was commenced and tried in the United States District Court for the Eastern District of Texas. The nature of the case is fully described in that portion of the district court's memorandum opinion labeled "Statement of the Case" (R. App. pp. 6-8). The findings of fact contained in the memorandum opinion (R. App. pp. 8-16) summarize the evidence adduced at trial more accurately than does petitioners' summary (Pet. pp. 3-6), which is a selective presentation of the testimony, and which, as such, distorts the basis for the trial court's decision.

Petitioners appealed the district court's decision. The court of appeals affirmed, ruling that evidence was sufficient to sustain the trial court's findings. 536 F.2d at 594. Petitioners' subsequent motion for rehearing was denied.

ARGUMENT

This case does not warrant review by this Court. The question presented for consideration, as stated in the petition and in this brief, involves an interpretation of state law in light of the evidence. Any decision by this Court would, thus, be of limited application.

In ruling that, for the purpose of the "merchant exception" to the statute of frauds, §2.201(b), Vernon's Texas Codes Annotated, Business and Commerce, a farmer could be a "merchant" within the meaning of §2.104(a), the court of appeals followed *Nelson v. Union Equity Co-operative Exchange,* 536 S.W.2d 635 (Tex. Civ. App. 1976), the decision of the only intermediate appellate court in Texas to consider the question. That decision is in accord with the construction placed upon the corresponding sections of the Uniform Commercial Code by most other courts and commentators addressing the issue.[1] Moreover, the construction was consistent with the Official

[1] Cases holding that a farmer can be a "merchant" for the purpose of the "merchant" exception to the statute of frauds include Continental Grain Co. v. Martin, 536 F.2d 592 (5th Cir. 1976), *aff'g* Civil No. B-73-CA-230 (E.D. Tex., filed Jan. 16, 1975); Bunge Corporation v. Biglane, Civil No. W75-21(N) (S.D. Miss., filed June 18, 1976) (dictum); Continental Grain Co. v. Brown, 19 UCC Rep. 52, Civil No. 74-C-303 (W.D. Wis., filed Apr. 19, 1976); Continental Grain Co. v. Harbach, 400 F. Supp. 695 (N.D. Ill., 1975); Sierens v. Clausen, 328 N.E.2d 559 (Ill. 1975), *rev'g* 315 N.E.2d 897 (Ill. App. 1974); Nelson v. Union Equity Co-operative Exchange, 536 S.W.2d 635 (Tex. Civ. App. 1976); Currituck Grain, Inc. v. Powell, 222 S.E.2d 1 (N.C. App. 1976); Billings v. Joseph Harris Co., 220 S.E.2d 361 (N.C. App. 1975) (dictum); Campbell v. Yokel, 313 N.E.2d 628 (Ill. App. 1974); Ohio Grain Co. v. Swisshelm, 40 Ohio App. 2d 203, 318 N.E.2d 428 (1973); Barron v. Edwards, 206 N.W.2d 508 (Mich. App. 1973); Victoria Elevator Co. v. Hensel, Case No. 21338 (Dist. Ct. Wright Co., Minn., filed December 5, 1974); Ohio Grain Co. v. Beery, Case No. 21603 (C.P., Union Co., Ohio, Apr. 30, 1974); and Continental Grain Co. v. D.A.D. Farms, Inc., Case No. 412-820 (Cir. Ct. Milw. Co., Wis., filed Apr. 10, 1974). Commentators stating that a farmer can be a "merchant" are 3 Bender's Uniform Commercial Code Service §2.04[2], at 2-66 (1975); Comment, 65 Mich. L.Rev. 345 (1966); Comment, 63 Ill. B.J. 271 (1975); Davidson, *Uniform Commercial Code, Statute of Frauds and Personal Property,* 4 Wake Forest Intra. L.Rev. 41, 62

Comments of the draftsmen of the UCC,[2] which comments have been given due regard by Texas courts. *Farley v. Clark Equipment Co.,* 484 S.W.2d 142 (Tex. Civ. App. 1972). Since the Texas Supreme Court had never suggested that it would reach a contrary conclusion, the court of appeals was justified in its ruling. *American Surety Company v. Coblentz,* 381 F.2d 185, 189 (5th Cir. 1967).

The district court's finding that petitioners were "merchants" with respect to confirming the oral contract between the parties had two independent bases: (1) that petitioners themselves were "merchants"; and (2) that petitioners vicariously were "merchants" due to their use of Tex Potter in negotiating the disputed contract (Findings 24-26; R. App. pp. 15-16). Petitioners' reliance on Potter made petitioners "merchants" because §2.104 includes within its scope a person who employs an "intermediary" who represents himself as being knowledgeable as to either the goods or the practices involved in the transaction in question. The trial court found that Potter was such an intermediary (Finding 24; R. App. p. 15), and the court of appeals sustained the trial court's findings. 536 F.2d at 594. *Nelson v. Union Equity Co-operative Exchange* does not involve a non-farmer intermedi-

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(1968); Hall, *Article 2 — Sales — "From Status to Contract"?* 1962 Wis. L.Rev. 209, 212 (1952); and Waite, *The Proposed New Uniform Sales Act,* 48 Mich. L.Rev. 603, 618 (1950). Loeb & Co. v. Schreiner, 321 So.2d 199 (Ala. 1975), and Cook Grains, Inc. v. Fallis, 395 S.W.2d 555 (Ark. 1965), go against the weight of this authority.

[2] Para. 2 of the Official Comment to §2.104 states in part that "[f]or the purpose of . . . [§2.201(b)] . . . almost every person in business would, therefore, be deemed a "merchant" under the language 'who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices involved in the transaction . . .' since the practices involved in the transaction are non-specialized business practices such as answering mail."

ary such as Potter. Since the issue of Potter's involvement will not be affected by the appeal of that case, this Court should follow its Two Court Rule and refuse to grant a writ of certiorari to review the factual determination that Potter vicariously made petitioners "merchants" in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CONTINENTAL GRAIN COMPANY, Plaintiff
VS.
MELVIN MARTIN & CLEM MARTIN, INDIVIDUALLY & d/b/a MARTIN BROS. & SON, Defendants
NO. B-73-CA-230

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MEMORANDUM OPINION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an action for breach of contract which came on for trial before the Court without the aid of a jury. Evidence was submitted by both parties; the cause was duly argued by counsel, both orally and upon written briefs subsequently filed, and the Court being fully advised in the premises, issues this Memorandum Opinion with Findings of Fact and Conclusions of Law.

STATEMENT OF THE CASE

In this cause of action Continental Grain Company seeks to recover damages which it sustained by reason of the Defendants' failure to perform on a contract between the parties. The subject contract was an oral agree-

ment whereby the Defendants agreed to deliver to Continental Grain a stated amount of a described grain commodity at a future time, to wit, soybeans. In return Continental Grain agreed to pay the Defendants a fixed price for such commodity. The parties' oral contract was confirmed in writing by Continental Grain. When the specified delivery time passed, the Defendants failed to deliver any of the contracted grain. The Defendants contend that they owe nothing to Continental Grain and say they never entered into the contract; and, if there was a contract, it is unenforceable because of the statute of frauds.

More particularly, this is a case of diversity of jurisdiction brought by the Plaintiff to recover damages for the alleged breach of contract which was made during August of 1972 on an alleged contract by the Plaintiff for the purchase of soybeans allegedly sold by the Defendants. In general, the Plaintiff claims that on or about August 22, 1972, a telephonic contract was made between the Plaintiff and the Defendant for the Plaintiff to purchase some 10,000 bushels of No. 1 soybeans from the Defendants at $3.30 per bushel. Subsequently, this contract was renegotiated for December 1972/January 1973 delivery date for $3.33 per bushel, and on both occasions, this was confirmed by the Plaintiff to the Defendants. Subsequently, the Defendants failed to deliver. The Plaintiff contends that the measure of damages for the Defendants' failure to deliver the beans should be the market price of the beans on the date of the refusal of delivery at the point of delivery (Beaumont, Texas).

In general, the Defendants contend that no contract was made between the Plaintiff and the Defendants, and that in any event, the Defendants are farmers and not mer-

chants as the term is defined under the Uniform Commercial Code, that he has never signed any writing sufficient to indicate a contract for sale existed; that no one authorized by him signed any such contract; and, in addition, that therefore the contract is barred by the Statute of Frauds, Sec. 2.201 and Sec. 1.206, Texas Business and Commercial Code.

FINDINGS OF FACT

1.

At all times material hereto, the Plaintiff is a corporation organized and existing under the laws of a state other than Texas with its principal office located at No. 2 Broadway, New York, New York. The Plaintiff maintains a grain elevator at the Port of Beaumont, Texas, in the Eastern District of Texas, for the purchase of various commodities including soybeans and for taking delivery of various commodities. The Plaintiff's business operation in Texas consists of buying, selling, storing, and transporting grain. In order to maintain its operations in the Beaumont area, Continental Grain maintains a buying office and grain elevator located at the Port of Beaumont. During the summer of 1972, the buying office was staffed by Les Strater, the manager and port coordinator, a Georgee Leone, now Williams, a grain buyer; and some other personnel.

2.

Continental Grain Company's operations are designed to involve a minimum risk and yet be profitable; so when the Beaumont office effectuates a purchase of grain or beans, it immediately notifies its Kansas City office which institutes a corresponding sale on the Chicago Board of

Trade. Continental Grain makes a sale on the Chicago Board of Trade (hedges) so that it may minimize its risk in a highly fluctuating market.

3.

Continental Grain does not make its profit by speculation on the Chicago Board of Trade but by selling beans or grain for cash primarily in the export market.

4.

The Beaumont office market includes the purchases of soybeans, wheat, milo, maize, and some corn. These contracts are made over a wide area, including some from as far away as Plainview, Texas, parts of eastern Arkansas, and all of Louisiana.

5.

Since the sellers within the Beaumont-office-contracts, are located over so wide an area and since the Beaumont office must constantly be aware of the Chicago prices in order to set its purchase price and since it must notify Kansas City of Beaumont office purchases to minimize its risks, the Beaumont office's purchase of grain must in all cases be consummated over the telephone.

6.

To comply with the Statute of Frauds and in order that any misunderstanding as to the parties' agreement over the phone may be properly resolved, the purchase confirmation is mailed to the seller on the same day as the oral agreement is reached.

7.

Martin Bros. & Son is a Texas partnership with its principal business in the farm year 1972 being the rais-

ing of soybeans for the purpose of sale. The principals of the partnership are the Defendant, Clem Martin, who is a resident of the City of Houston in Harris County, Texas; and his nephew, Melvin Martin, who is a resident of the City of Alvin in Brazoria County, Texas. Martin Bros. & Son had grown and sold rice for many years, but the year of 1972 was the first year for raising and selling soybeans.

8.

During the farming season of 1972, the Defendants raised soybeans as their sole means of income. On or about August 22, 1972, Mr. Clem Martin discussed booking some beans with a Mr. Tex Potter, a fertilizer salesman and a man knowledgeable of soybeans. They discussed various places that purchased beans, and after some discussion, it was decided to call Continental Grain in Beaumont, Texas, to "see about booking these beans." They discussed the fact that it was only August and that the beans would not be ripe until October or November and that if the Defendants did not harvest the amount of beans he had contracted to sell, then he would have to buy beans to make up the difference. Mr. Clem Martin and Mr. Potter then proceeded some 100 to 200 yards from the bean field to Mr. Clem Martin's barn where there was a telephone. Mr. Martin asked Mr. Potter to call in regard to booking the beans. They got the number from information, and Mr. Potter talked to a Georgee Leone, now Williams, at Continental Grain in Beaumont.

9.

Ms. Leone quoted the price of the beans as $3.30 for delivery in October/November, or $3.33 for delivery in December/January.

10.

This price was relayed to Mr. Clem Martin who told Mr. Potter to book the beans. During this conversation, Mr. Potter indicated that he was calling at Mr. Clem Martin's request.

11.

Acting on Mr. Clek [sic] Martin's request, Mr. Potter orally contracted to sell to Continental Grain 10,000 bushels of No. 1 yellow soybeans at $3.30 per bushel for October/November delivery in Beaumont, Jefferson County, Texas. Further discussion was had between Ms. Leone of Continental Grain and Mr. Potter of the details of this contract, and Mr. Potter in turn repeated each of these details to Mr. Clem Martin who agreed to the details of the contract. Specifically, there was no question in the minds of all concerned that Mr. Clem Martin agreed to sell 10,000 bushels of No. 1 yellow soybeans for $3.30 for October/November 1972 delivery to Continental Grain at Beaumont, Texas.

12.

Immediately upon completion of the telephone conversation, Ms. Leone informed her office in Kansas City of the purchase. Continental Grain in reliance on the contract immediately hedged their position on the Chicago Board of Trade.

13.

During the same day, a confirmation of the contract was typed and sent to Mr. Clem Martin at the address given in Houston, Texas. When this confirmation was received by Mr. Clem Martin, (Plaintiff's Exhibit 15) he called Mr. Potter and discussed the contract. Mr.

Martin stated he would like to have three (3) things changed: (1) the name of Clem Martin to Martin Bros. & Son; and (2) as there was no guarantee that his beans would be ripe in November, he would like a later delivery date (3) at a different price.

14.

Mr. Potter again went to the Martin farm where again he called Continental Grain in the presence of Mr. Clem Martin. Again, in the presence of Mr. Martin, Mr. Potter again discussed the details with Ms. Leone, and a subsequent delivery date was agreed upon to November/December delivery to Beaumont, Texas, at which time the quoted price was $3.33 per bushel. Mr. Clem Martin agreed to deliver 10,000 bushels of No. 1 yellow soybeans to Continental Grain at Beaumont, Texas, for $3.33 per bushel.

15.

Again the details of the contract were discussed between Ms. Leone and Mr. Potter, who, while Continental Grain was on the telephone, discussed each of the details with Mr. Martin, who agreed to deliver to Continental Grain 10,000 of No. 1 yellow soybeans to Continental's elevator at Beaumont, Texas, during the months of December and January for the price of $3.33 per bushel.

16.

A writing confirming the change in the agreement and binding on Continental Grain (Plaintiff's Exhibit 17) was sent to Mr. Clem Martin and was received by him within a day or so after the second telephone conversation.

17.

The Court finds that Mr. Clem Martin, acting for Martin Bros. & Son, agreed to sell to Continental Grain Company 10,000 bushels of No. 1 yellow soybeans at $3.30 per bushel to be delivered at Beaumont, Texas, during October/November, and that he subsequently agreed to sell to Continental Grain Company 10,000 bushels of No. 1 yellow soybeans for delivery at Beaumont, Texas, during the months of December 1972 and/or the month of January 1973 for $3.33 per bushel (Defendants' Exhibit 6).

18.

The Court further finds that within a reasonable time of both conversations, a writing in confirmation of the contract and sufficient against the sender, Continental Grain, was sent by Continental Grain and was received on both occasions by Mr. Clem Martin; and that Mr. Clem Martin knew at the time he had contracted to sell 10,000 bushels of No. 1 yellow soybeans for Martin Bros. & Son. Mr. Clem Martin did not send written notice or objection to the contents of the confirmation on either occasion.

19.

The place of delivery of these beans was Beaumont, Jefferson County, Texas, within the Eastern District of Texas. At the time of both conversations, Mr. Tex Potter, a man familiar with soybeans, was acting as the agent of Mr. Clem Martin and was acting with the express authority of Mr. Clem Martin.

20.

Subsequently, during 1972, the price of soybeans made an unforeseen and unusual rise. Concerned about this rise,

Ms. Leone called Mr. Clem Martin in early December 1972. At that time she was assured by Mr. Clem Martin that the beans had been harvested and that Mr. Martin intended to make delivery on the beans.

21.

On or about January 30, 1973, the last day of the contract, Ms. Leone again talked to Mr. Clem Marton [sic] on the telephone. At that time he assured her that he would deliver the 10,000 bushels of beans he asked for and received an extension of time for delivery until February 15th. Again, a confirmation in writing sufficient to bind Continental Grain was sent within a reasonable time and received by Mr. Clem Martin, (Plaintiff's Exhibit 18) and Mr. Martin knew its contents, granting the fifteen-day extension.

22.

Subsequently a notice was received in the mail by Continental Grain from Mr. Clem Martin's attorney, dated February 5, informing Continental Grain that he did not intend to live up to the contract. When they received the letter of February 5th, this was the first time that Continental Grain had received word from Mr. Clem Martin that he did not intend to perform under the contract. The market price of soybeans on January 31st in Beaumont, Texas, the place of delivery, was $5.13½.

23.

Mr. Clem Martin's actions of recontacting Continental Grain when he became worried that he could not make the October/November delivery and changed it to December/January; that his silence after receiving the confirmation of the change of the delivery date to December/January; his delay in notifying Continental that he did

intend to deliver until the receipt of his attorney's letter of February 5th; and his and his wife's assurance to Continental Grain that Martin Bros. & Son intended to deliver on two occasions; his receiving and retaining possession of the contract confirmations led Continental Grain by his actions and silence reasonably to conclude that the acts of Tex Potter had been adopted and sanctioned by Mr. Martin and Martin Bros. & Son and by permitting Continental Grain to rely thereon and hedge their contract amounted to a ratification of Mr. Potter's authority and of the contracts. Also, Mr. Clem Martin's actions in allowing Mr. Tex Potter to inform Continental Grain in Mr. Clem Martin's presence that he (Mr. Potter) had, on occasion, acted for Mr. Martin and for other farmers and was acting for him on this occasion further ratified this authority; and Mr. Martin was aware of Continental Grain's reliance on the contract.

24.

That on August 22nd and on August 24th, Martin Bros. & Son was a merchant in regard to soybeans; that Mr. Clem Martin on both August dates dealt on behalf of Martin Bros. & Son in soybeans; goods of a kind; that on the occasion of August 22nd and August 24th Mr. Clem Martin, acting for Martin Bros. & Son, employed Mr. Tex Potter, an intemediary [sic] who had knowledge of the goods involved (soybeans) and also the transaction involved; that by his occupation, a person who makes his entire living selling soybeans, holds himself out as having knowledge of soybeans and of the transaction involved.

25.

Mr. Clem Martin contends he and Martin Bros. & Son are farmers, unaccustomed to the affairs of business and

the market place. Evidence indicates that Mr. Martin and Martin Bros. and Son used some two million dollars worth of land, equipment and credit to finance their operations for the ultimate purpose of sale of goods of a kind, to wit, soybeans, the commodity in question. Further, the evidence indicates that Mr. Martin is a successful business man; that he was and is experienced in the various methods of selling his products and was aware of the various grading variables involved; that all the soybeans Martin Bros. & Son were growing on or about August 1972 were for sale and that they received a price in excess of $6.00 per bushel.

26.

Mr. Clem Martin and Martin Bros. & Son on the days in question were merchants within the meaning of Sec. 2.104 Texas Business and Commerce Code; that on or about August 22 and 24, 1972, dealings between Mr. Clem Martin in behalf of Martin Bros. & Son and Continental Grain was a dealing "between merchants" as both parties are chargeable with the knowledge or skill of merchants.

27.

The difference in the market price at Beaumont, Texas, the place of tender, on January 31, 1973, the last day the contract could have been completed, was $1.8050 per bushel, or $18,050.00 on the contract.

CONCLUSIONS OF LAW

1.

On or about August 22, 1972, and August 24, 1972, Mr. Tex Potter was the authorized agent of Mr. Clem Martin and Martin Bros. and Son.

2.

On or about August 24, 1972, a valid and enforceable contract was entered into between Continental Grain and Clem Martin, individually and doing business as Martin Bros. & Son.

3.

Mr. Clem Martin, acting for Martin Bros. & Son, failed to deliver on the contract by January 31, 1973, as agreed.

4.

Defendants are "merchants" as that term is defined in Section 2.104 of the Uniform Commercial Code (Vernon's Texas Code Annotated, Business and Commerce) and, therefore, Section 2.201 is not applicable.

5.

The statute of fraud defense is not applicable in this case.

6.

Continental Grain has been damaged in the sum of $18,050.00 with interest from January 31, 1973, at the rate of six (6%) per cent.

7.

Judgment is to be entered for Plaintiff and against Defendants.

ENTERED this 16th day of January, 1975.

/s/ Joe J. Fisher
UNITED STATES
DISTRICT JUDGE